

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF MICKLOS)
PAINTING CONTRACTORS)
) Docket No. MSBCA 2256
Under Maryland Aviation)
Administration Solicitation for)
Contract No. MAA-MC-2002-013)

January 23, 2002

Responsiveness - Omission of a 90 day extension provision (authorizing extension of the time for acceptance of bids for up to 90 days without seeking approval of the surety) in a bid bond required by the invitation for bid is a material defect rendering the bid nonresponsive.

APPEARANCE FOR APPELLANT: Mr. James Micklos
Sole Proprietor
Baltimore, MD

APPEARANCE FOR RESPONDENT: William A. Kahn, Esq.
Assistant Attorney General
Baltimore, MD

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of his protest against the Maryland Aviation Administration's (MAA) rejection of his low bid for the captioned Contract for interior and exterior painting at Baltimore Washington International and Martin State Airports. Appellant's bid was rejected because it was allegedly accompanied by a deficient bid bond.

Findings of Fact

1. On or about June 22, 2001, MAA issued an invitation for bids (IFB) for the Contract that is the subject of this appeal. The IFB was the second solicitation for interior and exterior painting at the airports.¹
2. Bid opening occurred on July 24, 2001.
3. The second solicitation provided, as exhibits (labeled section), the forms that each bidder was required to submit and the solicitation instructed the bidders that they must use these

¹ The first solicitation was canceled in May 2001 because of a need to revise the specifications. Ms. Stock, an MAA procurement official involved in both IFB's, returned Appellant's bid bond with a form cover letter dated May 10, 2001 advising that the bids for the first IFB had been rejected because of the need to change specifications and that a new contract would be advertised in the near future. Ms. Stock testified that she did not review the bid bonds prior to returning them to the bidders on the cancelled May IFB.

forms.

4. The bid bond was included as Section L, and the IFB provided that:

Each Bid (Section P) must be accompanied by a Bid Bond (Section L), if required, in the amount of 5% of the contract price, . . .

5. The necessity or requirement for a bid bond was stated in Special Provision SP-1.32, Bid Guarantee. This provision also reiterated that the bid bond form in Section L was to be used. Section SP-1.32A provided that “[e]ach Bid or Proposal over \$50,000 total price shall be accompanied by a bid guarantee (Section L) in the amount of five (5) percent of the total contract price.”²
6. At the bid opening on July 24, 2001, MAA received 9 bids. Appellant submitted the apparent low bid at \$212,595.00. The second apparent low bid was submitted by J.N.A. Painting Company, Inc. (JNA) at \$226,950.00.
7. Appellant submitted its bid on the required form, Section P. It also included with its bid the bid/proposal affidavit on the form specified in Section M, the minority business enterprise forms specified in Section N, and the experience qualifications form specified in Section Q. However, Appellant did not submit an executed bid bond on the form specified in Section L.³ Instead, Appellant submitted as a bid bond a materially different form.
8. Of the nine bids submitted, seven (7) were accompanied by bid bonds on the form prescribed by MAA. Only Appellant and one other bidder used different forms.
9. In a letter dated July 26, 2001, MAA rejected Appellant’s apparent low bid as nonresponsive because Appellant’s bid bond was found to be defective. MAA identified the insufficiency in Appellant’s bond form as the omission of the “90 day extension” clause language contained in the bid bond form in Section L.
10. The 90 day extension clause provides:

The Surety executing this instrument hereby agrees that its obligation shall not be impaired by any extensions(s) of the time for acceptance of the bid that the Principal may grant to the State, notice of which extension(s) to the Surety being hereby waived; provided that such waiver of notice shall apply only with respect to extensions aggregating not more than 90 calendar days in addition to the period originally allowed for acceptance of the bid.

11. On July 30, 2001 Appellant protested the rejection of its bid.
12. The protest was resolved in MAA’s final agency action of October 5, 2001. Relying on this Board’s decisions in V&S Contractors, Inc., MSBCA 2134, 5 MSBCA ¶469 (1999) and Keller Brothers, Inc./AccuBid Excavation, Inc. Joint Venture, MSBCA 1946, 5 MSBCA

²The page containing SP-1.32 was missing from the Agency Report. The Board finds that the representation by Respondent’s counsel concerning what SP-1.32 provided is accurate.

³Appellant’s bid submission included a copy of the Section L bid bond, partially completed but not executed on behalf of either Appellant or Appellant’s surety.

- ¶1395 (1996), MAA determined that the lack of the 90 day extension clause in Appellant's bid bond was a material defect that could not be waived and that rendered Appellant's bid nonresponsive. MAA thus affirmed its rejection of Appellant's bid and denied the protest.
13. Appellant appealed to this Board on October 15, 2001.
 14. In its protest and appeal Appellant alleges that Ms. Stock had told its surety "the way ... to prepare the bond." In its final agency action letter, MAA denied this allegation. In a pre-bid conversation, Ms. Stock told Appellant's surety's representative that the amount of the bid bond had to be 5% of the total contract cost, including an extra work allowance specified in the Bid Form as \$120,000. Appellant proffered at the hearing that Ms. Stock had told Appellant's surety what the bond requirements were and that Appellant's bond was acceptable. However, according to Ms. Stock's testimony at the hearing the form of the bid bond was not discussed.

Decision

Like the MAA solicitations in V&S Contractors and Keller Brothers, the invitation for bids in this case contained a set of bid forms, including a form of bid bond, that each bidder was required to use. For its bid, Appellant used all of the forms save the one mandated for its bid bond.

The bond form submitted by Appellant with its bid suffered from the identical deficiency as the bonds submitted with the low bids in V&S Contractors and Keller Brothers. Those bonds and Appellant's bond did not provide for automatic consent of surety to extensions of the irrevocability of the bid up to a period of 90 days. The result in this case thus is mandated by V&S Contractors and Keller Brothers.

Despite Appellant's assertion in its appeal letter that it could not find "any section that states that the surety bond must be submitted on [MAA's] form," the invitation unequivocally and unambiguously required the form in Section L. First of all, Section L was included in the solicitation. Second, because COMAR 21.06.07.03C(1) requires that the bond "shall be in the form specified by the Attorney General," the presence of the bond gave notice that its form had been "specified by the Attorney General."

Most important, however, is that the solicitation plainly told a bidder that all of the prescribed bid forms must be used. The Table of Contents for the invitation at page 4 lists all of the prescribed forms, including, as the first one, Section L, Bid Bond. At page ii-2 of the instructions, a bidder is told that its "Bid (Section P) must be accompanied by a Bid Bond (Section L), if required . . .," an instruction repeated in Special Provision SP-1.32A. That provision indicates that such a bond is required for a bid over \$50,000 and states again that the bid "shall be accompanied by a bid guarantee (Section L) . . ."

Section L itself reinforces this instruction. In bold letters across the top of the face page, it recites: "**NOTE: THIS BID BOND IS NOT REQUIRED IF TOTAL CONTRACT PRICE IS LESS THAN \$50,000.**" The unmistakable import of this note is that "this bond" is required if the bidder's total contract price is \$50,000 or more. Appellant's bid was \$212,595.00

In its appeal letter, Appellant alleges that “Ms. Stock had a sample of our bid-bond in her office before we submitted our bid she told [R]oger Smith of Micklos painting Co. that it was the right bid bond and to only make sure that we include the correct bid number.” Appellant apparently means that, in its bid in response to the prior solicitation for this Contract, Appellant evidently used the same defective bid bond that is the subject of this appeal. All bids were rejected and the prior solicitation was cancelled because of the need to revise the specifications. MAA did not reject any of the bids on the basis of lack of responsiveness. Thus, although Appellant is correct that Ms. Stock had a “sample” of Appellant’s bid bond, that fact is without legal significance. Ms. Stock testified at the hearing that she did not review the bid bonds prior to returning them to the bidders who submitted bids in response to the cancelled May IFB. In any event the focus of the protest must be on the requirements of the June solicitation and not the cancelled May solicitation.

MAA and Ms. Stock deny that Appellant was told that it had used a proper bid bond. However, even if such a statement was made, it would not affect the outcome of this case. Ms. Stock had no authority to modify the solicitation orally, for one of the bidders and not others, and, in any event, estoppel does not apply against the State in such circumstances. “RA Health Services, Inc. v. Department of Public Safety and Correctional Services, 344 Md. 85 (1996). MAA’s prescribed bid bond form had to be used.

We also note that if Appellant thought that the requirement was not clear, it was obligated to inquire before it submitted its bid. No claim of lack of clarity in the solicitation may now be heard. COMAR 21.10.02.03.A.

The bid bond submitted by Appellant with its bid materially departs from MAA’s prescribed bid bond. Under Appellant’s bond, the surety’s commitment is valid for the period of irrevocability of Appellant’s bid, which, for the instant solicitation, is 90 days.⁴ Nothing in Appellant’s bond extends the surety’s commitment if Appellant agrees that its bid will remain firm beyond the initial 90 day period of irrevocability.

In fact, the 90-day period of irrevocability has passed. Since bids were opened on July 24, 2001, unless extended by the bidders, all bids remained firm through October 22, 2001 and lapsed on October 23, 2001. Because of the pendency of this appeal, the second low bidder, JNA, was requested to and agreed to extend its bid for 90 days. Since JNA supplied the bid bond form required by MAA, when JNA extended its bid, that bond did not lapse on October 23, 2001. MAA may enforce that bid bond against JNA’s surety because the bond remains valid without the surety’s further consent.

Appellant’s filing of a protest and his subsequent appeal of the denial of its protest might be viewed as tolling the period in which its bid could be accepted. However, even though the bid may be deemed extended, Appellant’s bid bond lapsed on October 23, 2001 since Appellant’s bid bond lacked an automatic extension provision and Appellant has not provided its surety’s consent to

⁴The IFB did not specifically state the time that a bid must remain firm. Therefore, pursuant to COMAR 21.05.02.19A, the period of irrevocability was 90 days.

extend the bond or a new bond. Appellant's surety has a defense that the bond has expired and that there no longer is an enforceable commitment by the surety.

This appeal illustrates the importance of the 90 day extension clause in MAA's required bid bond form. It underscores why, as this Board previously has held, that the 90 day extension clause is a material term and its omission from a bid form renders the bid non-responsive. V&S Contractors supra; Keller Brothers supra.

Under Md. State Fin. & Proc. Ann. Code § 13-207, MAA was authorized to require bid security in connection with the solicitation for the instant Contract. When a State agency requires bid security, as MAA did here, it must reject a bid that is not accompanied by proper security. Md. State Fin. & Proc. Ann. Code § 13-208 (a).

Because Appellant's bid bond omitted a material term, its bid security was not proper and MAA was obligated to reject Appellant's bid.

Therefore it is Ordered this 23rd day of January, 2002 that the appeal is denied.

Dated: January 23, 2002

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
Chairman

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2256, appeal of Micklos Painting Contractors under Maryland Aviation Administration Solicitation for Contract No. MAA-MC-2002-013

Dated: January 23, 2002

Mary F. Priscilla
Recorder